



May 17, 2004

VIA E-MAIL AND U.S. MAIL

Frank Roddy
State Water Resources Control Board
Division of Water Quality
P.O. Box 100
Sacramento, CA 95812-0100
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Re: Comments on Triennial Review of the California Ocean Plan

Dear Mr. Roddy:

Thank you for the opportunity to provide comments regarding the upcoming triennial review for the California Ocean Plan. These comments are made on behalf of The Ocean Conservancy, Natural Resources Defense Council, Defenders of Wildlife, and their hundreds of thousands of California members. Because our members strongly value a healthy and vibrant ocean, one of our top priorities has been to protect and restore the health of California's coastal and ocean waters. Many of the issues of concern to our members were designated "high priority" during the 1999-2002 Triennial Review, but were not addressed in the 2001 Ocean Plan. As a result, many of our 1998 comments are still relevant to the current Triennial Review, and we append these comments and incorporate them by reference.

We would like to highlight five issues that are of the utmost importance to California's ocean health and encourage you to address these issues immediately.

1. The ASBS designation and its associated discharge prohibition should remain in effect.

On December 5, 2003, SWRCB staff proposed an amendment to the Ocean Plan that would "reclassify[] 'Areas of Special Biological Significance (ASBS)' to 'State Water Quality Protection Areas (SWQPAs)' and establish[] implementation provisions for discharges into SWQPAs."¹ This proposed amendment was based on the erroneous assumption that the Marine Managed Areas Improvement Act had the effect of changing the substance of the ASBS designation. The proposed amendment would have replaced the existing prohibition against discharges into ASBSs with weaker regulatory measures, in violation of law and the intent of the legislature. We opposed these amendments in a January 23, 2004 comment letter, which is attached and incorporated by reference, and in several scoping meetings held by SWRCB on the issue. We continue to vigorously oppose such revisions now.

¹ Notice of Public Scoping Meeting, Proposed California Ocean Plan Amendments (December 5, 2003), *available at* <http://www.swrcb.ca.gov/plnspols/oplans/scopenot.pdf>.

In July 2003, a report by the Southern California Coastal Water Research Project documented 1,658 illegal direct discharges into ASBS along California's coast.² Now that the SWRCB is in possession of this documentation, it should be focusing its resources on diverting or treating existing discharges, rather than attempting to simply legalize them. The Legislature made this a priority in AB 1747 (Committee on Budget, 2003), which provided that, with respect to Proposition 50 funding "[f]or projects that affect water quality, preference shall be given to funding projects that will eliminate or significantly reduce pollution into impaired waters and sensitive habitat areas, including areas of special biological significance." Accordingly, the Ocean Plan should not be amended to reduce the level of protection in these areas. Quite the contrary, the SWRCB should amend the Ocean Plan to provide for a comprehensive program of monitoring and restoring their water quality.

2. The Ocean Plan should contain a management plan for preventing the introduction of non-indigenous species.

As described in the U.S. Environmental Protection Agency's draft report, *Aquatic Nuisance Species in Ballast Water Discharges: Issues and Options* (Sept. 10, 2001), it is widely accepted that the introduction of non-indigenous species through ships' ballast water exacts increasing and significant costs on the economy, environment and human health, on the order of billions of dollars per year nationwide. California marine waters are no exception. Although ballast water is the main source of introductions of non-indigenous species to marine waters, other sources are also important and require attention. For example, exterior surfaces of vessels are a documented vector, as are aquaculture, fish stocking, and the release of aquarium contents.

Because it is so difficult to eradicate aquatic invasive species once they have become established, the key to addressing their impacts is preventing the establishment of new populations. We recommend that the SWRCB take a strong role in supporting and strengthening existing federal and state management efforts and develop and implement a comprehensive management plan, in coordination with Department of Fish and Game, the State Lands Commission and Boating and Waterways, to address non-indigenous species arriving from a variety of introduction pathways. The Ocean Plan should be revised to provide for such an interagency effort to be initiated within a year.

3. The Ocean Plan should contain water quality objectives that apply to brine waste discharge from desalination facilities.

Scientific studies have raised serious concerns about the impacts of brine waste discharges on coastal and marine life, and call for development of water quality objectives for brine wastes. Brine wastes are usually hyper-saline, and it can be inferred that their discharge will be toxic to organisms that cannot tolerate increased salinity or fluctuations in salinity.³ Increases in salinity can result in changes in community composition, as the intolerant organisms that can do so will relocate to avoid the plume. High salinity can also result in aggregation of suspended particles and higher turbidity, which in turn results in reduced transmitted light for phytoplankton and benthic plants and higher rates of sedimentation.⁴

² Southern California Coastal Water Research Project, Final Report: Discharges into State Water Quality Protection Areas (July 2003).

³ California Coastal Commission, *Seawater Desalination in California* (1993), available at <http://www.coastal.ca.gov/desalrpt>.

⁴ Id.

Brine waste can also contain a variety of chemical contaminants. All desalination plants use chlorine or other biocides to minimize the growth of algae on filters and other components.⁵ Brine discharge may also contain heavy metals, originating either naturally in feedwater or through contact with pipes and plant components. Naturally occurring metals are concentrated through the desalination process, and can be toxic to marine organisms. Other chemicals, such as coagulants, anti-scalants, cleaning agents, filter storage chemicals, and anti-foam agents can also be added to the brine waste in the desalination process.

Because it may contain numerous harmful substances, brine discharged from desalination facilities can pose a serious threat to marine life. This is not a new concern: the question of applying water quality objectives to desalination discharges has been raised in Ocean Plan Triennial Reviews since at least 1991. However, the pace with which desalination projects are now being proposed and planned makes it imperative that the SWRCB address this issue now. We urge SWRCB to amend the Ocean Plan to apply water quality objectives to brine waste discharge.

4. The Ocean Plan should provide for the establishment of numeric sediment quality objectives for all marine sediments.

Sediment contamination is a major source of environmental and human health problems, and is an overall indicator of the health of an aquatic ecosystem. Waters whose fish are listed as “contaminated” rarely are polluted with the same chemicals listed in the advisories because the sediments, not the waters, often store the chemicals that make their way into the food chain.

The Ocean Plan should consider these and other threats posed by pollutants that continue to accumulate in ocean and coastal sediments by adding sediment quality objectives for marine waters to the Ocean Plan. The State is already in the process of developing such objectives for enclosed bays and estuaries, pursuant to section 13393 of the California Water Code. Such objectives are to “provide adequate protection for the most sensitive aquatic organisms,” and shall be based on “a health risk assessment if there is a potential for exposure of humans to pollutants through the food chain to edible fish, shellfish, or wildlife.”⁶

However, sediments in bays and estuaries are only part of the problem. The SWRCB should capitalize on these ongoing efforts and expand its program to include all marine sediments. Such an approach would acknowledge that sediment quality has important implications for marine ecosystems, and would be consistent with the ecosystem-based management recommendations of the Pew Oceans Commission and the U.S. Commission on Ocean Policy.

5. The Ocean Plan should provide for comprehensive regional ambient water quality monitoring.

Californians have the right to know what pollutants are building up in their coastal environments – not just at the end of discharge pipes. Often, management efforts are stymied by the lack of baseline information on the state of our waters. Better information on the amounts and types of pollutants, including biological pathogens, in coastal and ocean waters will help agencies and the public make more effective decisions on how to protect and restore those waters.

⁵ Id.

⁶ California Water Code § 13393(b).

On October 8, 1997, the Governor signed Executive Order W-162-97 which required that by October 1, 1998, the Secretary of the California Environmental Protection Agency (Cal/EPA) must: (1) inventory existing ocean and coastal water quality monitoring programs; and (2) make recommendations for a comprehensive program for monitoring water quality and reducing pollution within coastal watersheds, bays, estuaries, lagoons, and near-shore ocean waters. The Governor also signed two companion bills – AB 1581 (Keeley, 1997) which provided funds to prepare the inventory and the monitoring plan, and AB 1429 (Shelley, 1997) which included provisions similar to those in the Executive Order, including a coastal monitoring Internet Web site. The SWRCB was assigned the responsibility of implementing the Cal/EPA aspects of the tasks of the Executive Order and these two bills. The inventory of the coastal water quality monitoring programs has been completed, and a Web site for the inventory was been developed (www.sfei.org/camp). However, “since there are many individual programs which currently exist, each providing information, it has been difficult to find who is monitoring what, and where.”⁷

These efforts must be more coordinated and must be completed in order to be fully effective. We recommend that the Ocean Plan be amended to include regional ambient water quality requirements that are consistent with, and that build upon, these efforts, as well as upon the nascent Surface Water Ambient Monitoring Program. The Ocean Plan also should support efforts to create regional ambient water quality monitoring programs within inland coastal watersheds, as is required in AB 1429, and incorporate into the Plan elements of those programs that affect ocean water quality as those elements are developed.

* * * * *

The recommendations above, if implemented, will help bring about significant improvement to the health of the ocean and its waters. With the increasing national focus on improving ocean health, caused by the Pew Oceans Commission and the U.S. Commission on Ocean Policy, the time is right for making changes consistent with these recommendations. Thank you for considering these comments, and please feel free to contact me if you have any questions.

Sincerely,

Sarah G. Newkirk
Pacific Region Ecosystems Manager
The Ocean Conservancy

David Beckman
Senior Attorney
Natural Resources Defense Council

Kim Delfino
California Program Director
Defenders of Wildlife

⁷ California Coastal Water Quality Monitoring Inventory, <http://www.sfei.org/camp/> (May 17, 2004).

ATTACHMENT 1

October 15, 1998

VIA E-MAIL AND U.S. MAIL

Dr. Francis Palmer
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Re: Comments on Triennial Review of the California Ocean Plan

Dear Dr. Palmer:

Thank you for the opportunity to provide comments regarding the upcoming triennial review for the California Ocean Plan. These comments are made on behalf of the Center for Marine Conservation (CMC) and the Natural Resources Defense Council (NRDC). Because our hundreds of thousands of members strongly value a healthy and vibrant ocean, one of our top priorities has been to protect and restore the health of California's coastal and ocean waters. These comments highlight and expand upon the testimony that was presented on behalf of CMC at the October 9th hearing in Monterey.

Many of the issues presented in *Staff Report: Issues for Review* (Staff Report) are critical needs and should be acted on as soon as possible to protect the health of our coastal and ocean waters. As noted in Governor Wilson's March 1997 ocean planning document, *California's Ocean Resources: An Agenda for the Future* ("Ocean Agenda"), industries that depend on a healthy coast and ocean contribute at least 17.3 billion dollars to the state's economy every year and provide 370,000 jobs. Tourism alone accounts for \$10 billion of this total. If coastal waters contaminated by polluted runoff continue to make beach users sick, as a recent Santa Monica study indicates, tourists may spend their dollars elsewhere. Polluted waters also impact the health of the state's fishing, shellfishing and aquaculture industries. The health of our ocean-dependent environment, population and economy depends upon sound planning, and full implementation of those plans.

The comments below are organized based on presentation of the issues in the Staff Report, and do not necessarily reflect our position on the priority that should be placed on a particular issue. The comments do note where particularly high priority should be placed on an item. At the end of these comments, we outline briefly several additional issues not addressed as part of the upcoming three-year review that should be considered.

1992 HIGH PRIORITY WORKPLAN ISSUES CURRENTLY UNDERGIONG STAFF REVIEW

Applicability

Dredging Activity

We strongly support the proposed amendment, detailed on page C-3, that would include the disposal of dredge spoils in the Ocean Plan. It makes sense that the dumping of dredged material in state ocean waters should be examined under the Ocean Plan, and there does not seem to be a legal basis for excluding this type of pollution. The Ocean Plan should be amended in 1998/99, as proposed, to clarify applicability to dredge spoils;⁸ additional guidance and requirements with respect to disposal of dredged materials then should be developed during the upcoming triennial review process.

The disposal of dredged materials can affect the health of state ocean waters both through direct disposal in ocean sites and through accidental disposal during transport across ocean waters (such as to the San Francisco Deep-Ocean Disposal Site). Dumping contaminated sediments in open water raises a multitude of hidden costs and issues, including ecological disruption, fish and shellfish contamination, smothering of existing communities and public health risks. These issues can be especially acute in sensitive nearshore waters. For example, in 1997, there were over 2,200 fish contamination advisories in the United States. Notably, the waters containing those fish were rarely contaminated with the same chemicals listed in the advisories because it is often the sediments, not the waters, that are the storage places for these chemicals and their route of entry into the food chain.

Many state ocean waters affected by dredge disposal contain a wide diversity of sensitive habitats as well as endangered and threatened species. Pollution of these habitats is of great concern to our organizations. For example, elevated levels of pollutants have been detected in the fetal tissue of local, endangered northern sea lions; consequently, "any further degradation of habitat would be of concern for this species."⁹

Moreover, the sea-surface microlayer (SMIC), the first layer of water to be affected by dumping, serves as a breeding ground for the pelagic eggs of many fish species and contains plankton and other microorganisms critical as food for all types of marine life. Research has shown that negative impacts to the SMIC can occur quickly, and so damage to marine life can occur well before toxicity is detected through monitoring activities.

State ocean waters also are threatened by transport of material to the Deep-Ocean Disposal Site (SF-DODS) near the Farallon Islands. It is well-known that not all of the dredged material sent to the SF-DODS makes it there. Recently, a tug hauling a barge heavily loaded with material dredged from Oakland Harbor sank, causing all of the dredge spoils on the barge to be dumped directly into the sensitive waters of the Monterey Bay National Marine Sanctuary. This accident was compounded by additional spills occurring immediately thereafter. Sanctuary officials taking aerial photos of the plume of spoils from the sunken tug observed another tug and barge making their way to the SF-DODS in heavy seas. Sanctuary officials saw that waves were crashing over the top of this barge and washing additional dredged material directly into Sanctuary waters.

Inclusion of dredging activities in the Ocean Plan should help address impacts from this pollution threat. The State Board certification process for materials dumped into state ocean waters should examine the range of potential impacts from dredge disposal and ensure that dredge disposal activities comply with Ocean Plan policies and standards. The Ocean Plan also should consider, where

⁸ See Staff Report, p. B-3.

⁹ Ainley and Allen, "Abundance and Distribution of Seabirds and Marine Mammals in the Gulf of the Farallones: Final Report to the EPA LTMS Study Group," p. 21 (July 30, 1992).

appropriate, seasonal site use restrictions in sensitive state waters. These could include breeding and/or spawning periods. Restrictions also could be placed on dumping during certain critical upwelling periods, when dumping could interfere with the influx of nutrients onto the continental shelf and so impact the production of food for many marine organisms. Finally, the Ocean Plan should consider requirements on transport of the dredged material to minimize the likelihood of accidental disposal into state waters.

Regional Mass Emission Regulation

Ongoing research has shown that ecological impacts from water pollution are complex, and that end-of-pipe regulations alone do not address many of these impacts. The increasing quantity of discharges, both point and nonpoint, into the ocean has cast serious doubt on the assumption that the current method of calculating effluent limitations will consistently achieve Table B water quality objectives. There is an immediate need for regulation on a mass-loading basis to complement the existing concentration-based system. This need was recognized in part last year by the passage of legislation (Assemblymember Shelley's AB 1429) that called for development of a monitoring strategy for coastal waters that includes mass emissions. Accordingly, we strongly agree that the Ocean Plan should regulate water quality on a mass emission basis, and that this effort should be given high priority.

Regulatory Control of Stormwater Discharge

The 1987 amendments to the Clean Water Act require EPA to: identify the stormwater pollution discharges not covered under the first phase of the municipal and industrial NPDES stormwater permits; identify the nature of the pollutants in those discharges; identify the methods of control necessary to mitigate their impacts on water quality; and issue regulations to establish priorities, requirements for State stormwater management programs, and expeditious deadlines. EPA's resultant Proposed Rule covers all census-designated "urbanized areas," all construction sites of 1 to 5 acres in size (unless granted a waiver), and areas designated by states. As the EPA moves to finalize and implement "Phase II," states should seize this important opportunity to expand and improve upon stormwater regulation.

Stormwater is a major source of pollution of the state's ocean waters, particularly in Southern California, and so we strongly recommend that it be an integral part of the Ocean Plan. We believe that there is enough information for the state to move forward to address stormwater impacts in ocean waters and develop numeric criteria for regulating stormwater. We urge State Board staff to work closely with groups conducting stormwater control efforts and incorporate successful control strategies into the Ocean Plan, with a focus on areas particularly impacted by stormwater.

Beneficial Uses

Revision of Beneficial Uses List

We strongly agree that the list of beneficial uses in the Ocean Plan should be revised to be consistent with the lists in the Regional Water Quality Control Plans. As noted in the Staff Report, the Ocean Plan is the primary regulatory document for state ocean waters and is the policy document providing guidance to the Regional Boards. As such, it should be as consistent with the basin plans as possible.

We also suggest that the list of beneficial uses be expanded to include “preservation and enhancement of National Marine Sanctuaries.” National marine sanctuaries constitute some the nation’s most pristine and significant aquatic ecosystems and should be recognized for special protection in the Ocean Plan.

Water Quality Objectives

Water-Contact Bacterial and Fecal Coliform Standards

Polluted waters may contain a number of different disease-causing organisms that can impact human health. Viruses are believed to be the major cause of swimming-related illnesses, and are responsible for gastroenteritis, hepatitis, respiratory illness, and ear, nose and throat problems. Gastroenteritis also can be caused by bacteria and can cause symptoms such as vomiting, diarrhea, stomach ache, nausea, headache and fever. Other microbial diseases that can be contracted by swimmers include salmonellosis, shigellosis, and infection caused by *E. coli*.¹⁰ Adequate testing of state waters is essential to protect the health of beachgoers and the state’s coastal tourism economy.

Last year, we worked to help pass Assemblymember Howard Wayne’s AB 411, which called on the state Department of Health Services to develop updated beach water testing standards and improve testing and posting of public beaches. As a result of AB 411, the Department of Health Services is developing regulations that will address enterococcus. It has been shown in epidemiological studies that enterococcus monitoring identifies health effects not clearly shown by total and fecal coliform monitoring; hence, there is no scientific support for excluding enterococcus from the Ocean Plan. Moreover, there also is no legal support for exclusion. Water Code Section 13170.2(b) states that the Ocean Plan standards must not “pos[e] a threat to human health.” Because the presence of enterococcus will identify human health threats not necessarily identified by the presence of total and fecal coliform, excluding enterococcus from the Ocean Plan threatens human health. Accordingly, we strongly recommend adding enterococcus to the total and fecal coliform water-contact bacterial standards currently in the Ocean Plan.

Desalination Facilities

We believe that there is no basis to exempt brine waste discharges from the Table B list of water quality objectives, and agrees with the Staff Report that there is not enough information to make such an exception. Indeed, the studies outlined in the Staff Report raise concerns about the impacts of brine waste discharges on coastal and marine life, and call for development of water quality objectives for brine wastes. With increasing pressure to bring desalination plants on line, the need for such water quality standards is similarly increasing. We ask that staff continue research into the impacts of brine waste and develop water quality objectives as appropriate.

Sediment Quality Objectives

As noted above, it is increasingly being recognized that sediment contamination is a major source of environmental and human health problems. Waters whose fish are listed as “contaminated” rarely are polluted with the same chemicals listed in the advisories because the sediments, not the waters, often store the chemicals that make their way into the food chain.

¹⁰ NRDC, *Testing the Waters*, Vol. VIII, p. 5 (July 1998).

The Ocean Plan must consider these and other threats posed by pollutants that continue to accumulate in ocean and coastal sediments. The establishment of numeric sediment quality objectives was labeled a "high priority issue" during the 1987 Ocean Plan review. The subsequent Bay Protection and Toxic Cleanup Program (BPTCP) has not yet produced the numeric sediment quality objectives that were one of the original goals of that program, and there is no indication that objectives will be forthcoming in the near future. We strongly recommend that numeric sediment quality objectives be developed and included in the Ocean Plan as soon as possible. Research from the BPTCP, EPA and elsewhere should provide staff with enough information to begin this task immediately by developing sediment quality screening levels, and then using the screening levels to develop sediment quality objectives.

Implementation

Regional Ambient Water Quality Monitoring

Californians should have the right to know what pollutants are building up in their coastal environments – not just at the end of discharge pipes. Moreover, better information on the amounts and types of pollutants in coastal and ocean waters will help agencies and the public make more effective decisions on how to protect and restore those waters. As noted in Governor Wilson’s Ocean Agenda, “the majority of California’s waterways and small estuarine systems are not monitored on a regular basis,” and so as a result it is “difficult to comprehensively determine the health of these water bodies.” The Governor’s Ocean Agenda concludes that “improved monitoring will be necessary” for the state to understand and respond to coastal pollution.

Legislation passed last year (Assemblymember Shelley’s AB 1429 and Assemblymember Keeley’s AB 1581), as well as an executive order signed by Governor Wilson, respond to this call for better information about the health of our coastal and ocean waters by requiring the development and implementation of a comprehensive, coordinated water quality monitoring program that includes coastal watersheds. State Water Board staff have completed an inventory of coastal monitoring programs as well as a draft monitoring strategy. We recommend that the Ocean Plan include regional ambient water quality provisions that are consistent with, and that build upon, these efforts. The Ocean Plan also should support efforts to create regional ambient water quality monitoring programs within inland coastal watersheds, as is required in AB 1429, and incorporate into the Plan elements of those programs that affect ocean water quality as those elements are developed.

Finally, as noted in the Staff Report, “near-coastal ambient toxicity monitoring should focus on sediments” due to increasing data showing an alarming buildup of toxics in sediments.¹¹ Accordingly, regional ambient monitoring also should include sediment quality monitoring.

Review of Standardized Monitoring and Reporting

We agree that the Ocean Plan should be modified to provide greater guidance regarding monitoring and reporting requirements. To maximize the usefulness of collected monitoring data, the Ocean Plan must contain standard reporting requirements for both point and nonpoint pollution. Reporting requirements should be relatively user-friendly yet provide the level of detail needed to analyze adequately the threats posed by identified contaminants. This type of standardization is essential to an efficient, effective monitoring program and to effective reporting of data to the public.

¹¹ Staff Report, p. D-14.

The Ocean Plan also should include provisions for refining these procedures and for increasing the amount of detail reported as new monitoring and reporting tools become available.

Nonpoint Source Control

We strongly urge that the Ocean Plan include a specific implementation plan for controlling nonpoint sources of pollution. This plan also should include detailed provisions for implementing TMDLs that must address nonpoint source pollution.

Nonpoint source pollution, or polluted runoff, results in beach closings and advisories, habitat degradation, closed or harvest-limited shellfish beds, declining fisheries, red tides and other harmful plankton blooms, and threats to the drinking water of coastal communities. As concluded in Governor Wilson's Ocean Agenda, polluted runoff is the number one source of pollution in California's coastal and ocean waters. Currently, 80 percent of the state's population lives within 30 miles of the coast, and they value clean water. A survey conducted last fall indicates that 72 percent of Californians rank keeping the oceans clean as a high environmental priority. The beauty and economic promise of California's coastline guarantees that the number of people living there will continue to rise, putting ever-increasing stress on the health of our coastal and ocean waters. California cannot afford to delay a firm commitment to controlling polluted runoff.

The state has been working for the last several years to develop an adequate plan to control coastal nonpoint source pollution. Technical advisory committees have prepared documents recommending a variety of methods for controlling polluted runoff, and we have been informed that State Water Board staff have been preparing a summary document of these management measures. We recommend that the Ocean Plan be revised as soon as possible to include appropriate, specific measures and policies to control nonpoint source pollution into state ocean waters. Nonpoint pollution control policies are already beginning to be included various in Regional Water Quality Control Plans, and should be included in the Ocean Plan as well. For example, we recommend that the Ocean Plan address implementation of the Santa Cruz-Monterey Model Urban Runoff Program in coastal areas.

In addition, we recommend that the Ocean Plan include language regarding enforcement of the proposed management measures. For example, the Ocean Plan should identify clear, specific and automatic triggers for moving from Tier I (voluntary) enforcement to Tiers II and III. The need for such enforcement is critical to controlling nonpoint source pollution in state ocean waters.

Based on current goals, California should have a final Coastal Nonpoint Pollution Control Program, along with a detailed five-year implementation strategy, by the end of 1999. Therefore, there should be enough detail available to Ocean Standards Unit staff to move forward during the upcoming triennial review period to incorporate specific nonpoint pollution control provisions into the Ocean Plan.

STATUS OF REMAINING 1992 WORKPLAN ISSUES

Beneficial Uses

Areas of Special Biological Significance

Protecting our highest-quality waters is not only beneficial to the health of Californians and their environment, it is also far more cost-effective in the long run than cleaning up contamination. Unlike a

number of other states, however, California has no effective prevention program for ensuring that high-quality water bodies are provided the protections they need to avoid degradation.

The Ocean Standards Unit's proposed ONRW/OSRW program, which should be released in draft shortly, may help address some of the shortcomings of the state's antidegradation program as well as the current ASBS program. We plan to comment on the ONRW/OSRW proposal when it is released, and would like to reserve the right to add additional comments as necessary on the ASBS program at that time. We would like to emphasize now, however, that staff avoid removal of ASBS, as suggested in the Staff Report, simply because inadequate regulation and/or enforcement has allowed them to degrade. Rather, the value of such sites, as indicated by their original designation as ASBS, should support work to restore any degraded sites.

Water Quality Objectives

Extension of the Boundary for Water-Contact Zone

We agree that water-contact recreation has changed substantially since the 1,000-foot boundary was instituted, and that an extension of that boundary may be warranted. We recommend that the Ocean Standards Unit staff conduct a survey of users that may frequent the areas outside the current boundary and determine what an appropriate, protective extension should be. This is a relatively straightforward exercise with potentially significant human health impacts, and so should be elevated in priority.

NEW ISSUES RAISED SINCE 1992 WORKPLAN WAS APPROVED

Applicability

Ship Ballast Water and Non-Indigenous Organisms

We strongly support the proposed amendment detailed on page C-3 that would specify that the Ocean Plan applies to the disposal of vessel wastes. Non-native species now rank second to habitat destruction in the threats they pose to native, imperiled species, and little is being done to check their growth. The Ocean Plan should be amended in 1998/99, as proposed, to clarify its applicability to vessel wastes.¹² Additional guidance and requirements with respect to vessel wastes, particularly ballast water, then should be developed as part of the upcoming triennial review process.

Non-native species pose significant threats to the health of the environment, economy and the public. For example, the zebra mussel is having a devastating effect on the Great Lakes' economy through its colonization of ships' hulls, water pipes and shoreline structures and is causing major damage to the environment through disruption of food webs and eradication of native mussel populations. Congress has estimated that costs resulting from the impact of this one species on the Great Lakes will total \$5,000,000,000 by the year 2000.

Ballast discharges also pose substantial risks to human health. Microscopic, neurotoxin-producing organisms called dinoflagellates have been transported in the sediments carried with ballast water and discharged into new regions of the world, where they have produced toxic "red tides." Such toxins accumulate in shellfish, causing illness and sometimes death in the people that eat them, and in

¹² See Staff Report, p. B-3.

some regions have even caused illness in people that merely breathed the sea air.¹³ Another neurotoxin-producing dinoflagellate that could be transported in ballast water is called *Pfiesteria piscicida*, or the “phantom dinoflagellate.” *Pfiesteria* has caused large fish kills on the Eastern U.S. coast and memory loss and health problems in some people exposed to contaminated waters.¹⁴ An epidemic strain of cholera was transported in ballast water from South America and discharged into waters in the southeastern United States, where it was discovered in fish and shellfish.¹⁵ Ballast water may well have been the mechanism that originally transported the strain from Asia to South America, setting off the 1991 epidemic that resulted in 1 million reported cases and over 10,000 deaths.¹⁶ Meanwhile, microbial studies conducted in Canada this past winter on ships arriving mainly from Europe found that ballast water commonly violated water discharge standards, with more than 50% of the ships carrying ballast water contaminated with fecal coliforms. Ships arriving in the summer, or from Asian ports, would be likely to have substantially higher rates of contamination.¹⁷

Examples abound of serious problems caused by non-native species in the San Francisco Bay-Delta region as well. It is for this reason the Bay Area Regional Water Quality Control Board designated “exotic species” as a “high priority pollutant” under Section 303(d) of the Clean Water Act. Because exotic species was designated as high priority, the Regional Board will begin this year to develop maximum loads of non-native species that can be discharged into the Bay, with the distinct probability that such discharges will be completely prohibited in the Bay in the near future.

In light of this information, there is no basis for excluding the regulation of contaminated ballast water discharges from the Ocean Plan. Water Code section 13170.2(b) states that the Ocean Plan standards must not allow “degradation to indigenous marine species or pos[e] a threat to human health”; excluding regulation of contaminated ballast water from the Ocean Plan clearly threatens both marine species and human health. We strongly urge that the Ocean Plan be amended as soon as possible to regulate this threat. CMC provided a number of documents on this topic to Ocean Standards Unit staff at the Monterey public hearing on October 9th; we would be happy to review those documents and provide other supporting materials on this issue.

Water Quality Objectives

Review Chemical Water Quality Objectives

We strongly support review of the existing chemical water quality objectives, revision of existing objectives as necessary based on new information, and addition of new water quality objectives. This effort should be given high priority. Issues that should be addressed include, but are not limited to, the following:

¹³ Hallegraeff, G. M. and Bolch, C. J., “Transport of Toxic Dinoflagellate Cysts Via Ships’ Ballast Water,” *Marine Pollution Bulletin*, Vol. 22, No. 1, pp. 27-30 (1991); Culotta, E., “Red Menace in the World’s Oceans,” *Science*, Vol. 257, pp. 1476-77 (1992).

¹⁴ Culotta, E., “New Killers Unmasked,” *Science*, Vol. 257, No. 11, p. 1477 (1992); Mlot, C., “The Rise in Toxic Tides,” *Science News*, Vol. 152, pp. 202-04 (1997).

¹⁵ 58 Fed. Reg. at 64381-82 (Dec. 12, 1991); McCarthy, S. A. and Khambaty, F. M., “International Dissemination of Epidemic *Vibrio cholera* by Cargo Ship Ballast and Other Nonpotable Waters,” *Environmental Microbiology*, Vol. 60, No. 17, pp. 2597-2601 (1994).

¹⁶ Ditchfield, J., “Cholera, Plankton Blooms, and Ballast Water,” *Global Biodiversity*, Vol. 3, No. 3, pp. 17-18 (1993); Taux, R. V., “Epidemic Cholera in the New World,” *Emerging Infectious Disease*, Vol. 1, No. 4, pp. 141-46 (1995).

¹⁷ Whitby, G. E., “A Microbial, Chemical and Physical Survey of Ballast Water on Ships in the Great Lakes,” Presented at the Eighth International Zebra Mussel and Aquatic Nuisance Species Conference, Sacramento, CA (March 16-19, 1998).

- Table B water quality objectives should not be limited to protection of only two beneficial uses (“aquatic life” and “seafood ingestion”).¹⁸ The Ocean Plan instead should include water quality objectives that provide full protection for the range of beneficial uses, including those related to human contact with ocean waters; threats from this use can be significant, as detailed in the recent study of Santa Monica beach users, which showed that humans are being impacted from constituents in stormwater pollution.
- The Ocean Plan should add those pollutants of concern not currently included in the Ocean Plan that have U.S. EPA water quality criteria.
- Water quality objectives that protect the seafood consumption use should be set based on estimates that protect the health of the state’s most vulnerable citizens: low-income pregnant women and children that consume large amounts of locally caught seafood in their diets. The 23 grams per day figure currently used is likely far too low to reflect consumption within that population group.
- Staff should ensure that the water quality objectives fully address potential impacts from bioaccumulation. Currently, the objectives are based on the assumption that wastewater is carried away, preventing local build-up of pollutants.¹⁹ Numerous studies now show that this is not the case, and that bioaccumulation is a significant threat to wildlife and to humans consuming contaminated seafood. The water quality objectives should be updated to reflect this important information.

Format and Organization

Clarification of Terminology

We support the proposed clarification of terminology, and requests that the Ocean Plan further clarify the definitions of “ocean waters” and “enclosed bays.” Currently, it is extremely difficult for the public to determine from the Ocean Plan where the boundaries of ocean waters lie. Clear definitions that include more specific examples of “ocean waters” versus “enclosed bays,” and, ideally, a map of the ocean waters boundary, would be quite useful in ensuring appropriate regulation of affected waters.

ADDITIONAL ISSUES

Promote Increased Stewardship of National Marine Sanctuaries

As noted above, much of the state’s coastal and ocean waters are within designated National Marine Sanctuaries. California is fortunate to have state ocean waters of such ecological significance, and should do its utmost to protect the health of those waters. We ask that Ocean Standards Unit staff consider including in the Ocean Plan a policy that identifies the significance of the National Marine Sanctuaries within California’s borders and emphasizes the need to give their health careful consideration during certification and/or other review processes.

Add a Mid-Triennial Review Workshop

¹⁸ See Staff Report, p. C-4.

¹⁹ *Id.*

We request that staff schedule a workshop on the Ocean Plan midway through the triennial review cycle. The current procedure for updating the Ocean Plan does not necessarily provide for the full discussion of issues that should be performed to ensure that the Plan protects our state ocean waters as effectively as possible. A one-day workshop could be extremely helpful in both assessing progress to date and beginning to identify new issues to consider during the next triennial review.

Consider Prohibition on Discharge of Central Valley Agricultural Waste into the Ocean or into Waters that May Impact State Ocean Waters

Over the years, various entities have proposed on a regular basis the construction of a tunnel that would carry untreated agricultural wastewater from the Central Valley to the ocean, to be dumped into or directly adjacent to state ocean waters. Not only would such a tunnel, or “wastewater superhighway,” pose significant threats to ocean waters from agricultural wastes, it also would pose threats from industrial and municipal wastes. Specifically, the basin plans for the Central Valley include language stating that if and when an agricultural wastewater tunnel is built, then that tunnel should be considered as a conduit for industrial and municipal wastewater as well. The resulting impacts could be enormous.

We worked closely with numerous other environmental, citizen and fishing groups over the last several years to prevent (successfully) the latest incarnation of this dangerous project. Considering the state’s history with these tunnel proposals, however, it is likely that the tunnel will be proposed again in some form. We ask Ocean Standards Unit staff to prevent this continued battle by investigating a prohibition on the discharge of Central Valley agricultural waste into the ocean or into waters that may impact state ocean waters.

* * *

It is appropriate in this Year of the Ocean that the state plan for significant improvements in the health of the its ocean waters. This effort will help improve the health of the people, wildlife and economies that depend upon healthy ocean waters. If you have any questions regarding the above comments or need additional information, please do not hesitate to call. Thank you.

Sincerely,

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ATTACHMENT 2

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January 23, 2003

Frank Roddy
Division of Water Quality
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100



VIA EMAIL: roddf@dwq.swrcb.ca.gov

Re: Comments on the ASBS Provisions of the Proposed Amendments to the Water Quality Control Plan for Ocean Waters of California

Dear Mr. Roddy:

Thank you for the opportunity to review and provide comments on the Areas of Special Biological Significance (ASBS) provisions of the proposed significant amendments to the Ocean Plan. We agree that in light of the recently-completed State Water Resources Control Board (SWRCB) study of discharges into the state's 34 ASBS's, now is a good time to begin a serious effort to treat and/or divert those discharges. However, while we appreciate the substantial amount of time and effort that you and your staff have put into developing these amendments, we have grave concerns with regard to the effect of these amendments in rolling back protections for some of the state's most unique marine habitats.

1. AB 2800 Did Not Change the Prohibition of Discharges into an ASBS.

Areas of Special Biological Significance are the most pristine coastal waters in the state. The Ocean Plan defines "ASBS" as "those areas designated by the SWRCB as requiring protection of species or biological communities to the extent that alteration of natural water quality is undesirable."²⁰ Protecting these areas is so critical to the people of California that "preservation and enhancement" of any ASBS is a beneficial use explicitly listed in the Ocean Plan,²¹ as well as in several regional basin plans.²² To date, protection of this beneficial use and prevention of alteration of natural water quality has been accomplished in the only conceivable way, given the definition of "ASBS" – through an outright

²⁰ State Water Resources Control Board, "Water Quality Control Plan – Ocean Waters of California" (2001) at Appendix I (Ocean Plan).

²¹ Ocean Plan at I.A.

²² See, e.g. http://www.swrcb.ca.gov/rwqcb3/BasinPlan/BP_text/Chapter2.htm.

prohibition on discharge of waste. This provision of the Ocean Plan is abundantly clear: “Waste shall not be discharged to areas designated as being on special biological significance.”²³

In 2000, AB 2800 (Shelley) – the Marine Managed Areas Improvement Act – created an umbrella category of marine managed areas focused on water quality. These “State Water Quality Protection Areas” (SWQPA) are defined in Public Resources Code § 36700(f) as follows:

(f) A "state water quality protection area" is a nonterrestrial marine or estuarine area designated to protect marine species or biological communities from an undesirable alteration in natural water quality, *including, but not limited to, areas of special biological significance* that have been designated by the State Water Resources Control Board through its water quality control planning process.

(Emphasis added.) Thus, by definition, “ASBS” is a subset of “SWQPA.” AB 2800 did not affirmatively change “ASBS” into “SWQPA.” It merely placed them into a larger category of marine managed areas, which it designated as SWQPAs. AB 2800 did not eliminate the ASBS designation, nor did it provide that existing – more protective – regulations of discharge into an ASBS were inconsistent with the new categorization, which provides that in a SWQPA “point source waste and thermal discharges shall be prohibited or limited by special conditions. Nonpoint source pollution shall be controlled to the extent practicable.”²⁴ Consequently, the new SWQPA category and its accompanying rules can legally coexist with the existing prohibition against discharges into an ASBS.

The proposed amendments start from the erroneous assumption that the SWQPA designation was intended to replace the ASBS designation, and that each SWQPA is an ASBS. Accordingly, the amendments use the term “ASBS/SWQPA” to refer to “ASBS,” and make substantive changes that are inconsistent with the need to protect natural water quality in an ASBS. We strongly disagree with both the threshold assumption and the actions that follow from it. The statutory language clearly contemplates the continued existence of ASBS’s as a subset of SWQPA. An ASBS will retain its character as particularly pristine marine area worthy of special protection even within the new categorization system. The SWRCB should not adopt any proposed amendments that would regulate out of existence areas that the Legislature clearly intended to exist.

2. Past Inattention to the Discharge Prohibition Has Resulted in Thousands of Existing Discharges into ASBS’s.

In July of 2003, the Southern California Coastal Water Research Project (SCCWRP) released the results of a survey of discharges²⁵ into all 34 ASBS’s in California. The report, entitled “Discharges into State Water Quality Protection Areas,” stated that there are 1,658 direct discharges into ASBS’s statewide.²⁶ These discharges were subdivided into wastewater discharge points (31 statewide), municipal/industrial storm drains (391 statewide), small storm drains (1012 statewide), and nonpoint sources (224 statewide).

²³ Ocean Plan at III.E.1. This prohibition applies to both point and nonpoint sources of waste, and the only explicit exception is for certified limited-term activities.

²⁴ AB 2800 (Shelley 2000), *amending* Pub. Res. Code § 36710(f).

²⁵ Discharges were defined as non-natural sources. The total number of discharges reported above does not include outlets, which are defined as naturally occurring sources. Southern California Coastal Water Research Project, “Final Report: Discharges into State Water Quality Protection Areas” (July 2003), at 7-8 (SCCWRP Report).

²⁶ *Id.* at 7.

This is an unconscionable amount of discharge into areas that have been protected by a clear prohibition against discharge of any kind. The existence of so many discharges suggests an unwillingness on the part of the Regional Water Quality Control Boards (RWQCBs) and SWRCB to enforce the standards necessary to protect “natural water quality,” and thereby the sensitive biological communities that inhabit each ASBS. It is not surprising, then, that the proposed amendments could potentially legalize most of the existing discharges, rewarding those who have flouted the discharge prohibition in the past with a “get out of jail free” card. The SWRCB should be cognizant of the tremendous inequity inherent in the proposed action to approve the continued fouling of these unique and fragile habitats.

3. The Proposed Amendments Would Substantially Weaken Standards for Protecting Areas of Special Biological Significance.

The Discharge Prohibition

The discharge prohibition is the fundament of an ASBS. As noted above, the definition of ASBS characterizes these areas as protecting biological communities that – because of their rarity, fragility or other reasons – require the maintenance of natural water quality. The definition itself leads quite naturally to the conclusion that alteration of natural water quality within an ASBS – that is, discharge – should be prohibited. The discharge prohibition is virtually implicit.

Ignoring this reasoning, the proposed amendments would eliminate the discharge prohibition, changing the relevant provision in the Ocean Plan from “[w]aste shall not be discharged . . .” to “waste discharges . . . are prohibited, except as authorized . . . below.” The discharges that become “authorized” under this provision will be discussed in more detail below, but it suffices to say here that this change would not only legalize most of the existing discharges into ASBS’s, but would set standards that would permit additional discharges and flows, inevitably resulting in increasingly unnatural water quality. This result would be inconsistent with the definition – indeed with the very purpose – of an ASBS. We strongly recommend against the adoption of this change. The discharge prohibition should remain in place.

Stormwater Discharges

Storm water runoff from land uses and urban development is the number one measured source of pollution to California’s coastal waters,²⁷ and the SCCWRP report documented 1,403 existing stormwater discharges into ASBS’s along California’s coast.²⁸ Because of the dangers posed by some of the most common constituents of stormwater – nutrients, bacteria, pesticides and metals – these discharges should be rigorously controlled in any area; they should be prohibited in an ASBS.

The proposed amendments would permit any stormwater discharge that is authorized under a NPDES permit, as long as the discharger complies with some additional, largely ministerial, responsibilities. Any NPDES stormwater permittee wishing to discharge into an ASBS must submit their Storm Water Management Plans or Storm Water Pollution Prevention Plans (which are already required under the NPDES stormwater regulations²⁹) on a somewhat accelerated time schedule. If it is determined that discharges are causing or contributing to exceedences of applicable water quality objectives, the discharger would be required to submit a report to the SWRCB describing BMPs that are currently being

²⁷ U.S. EPA, “National Water Quality Inventory, 1998 Report to Congress,” (EPA 841-R-00-0001) at 282-83.

²⁸ SCCWRP Report at 8.

²⁹ 40 C.F.R. § 122.34.

implemented, and additional BMPs that may be implemented. There is no requirement that the discharger achieve a quantitative reduction in the discharges that are causing or contributing to the water quality violation. Moreover, the discharger would be required to submit its report only once – no updates or progress reports would be required, even if exceedences continue. Finally, the amendments purport to prohibit non-stormwater discharges through stormwater conveyances. (It should be noted, however, that unauthorized discharges into NPDES-authorized stormwater systems are already prohibited.³⁰)

With the exception of additional monitoring, which is discussed below, these amendments do not impose a single new substantive requirement on holders of NPDES stormwater permits wishing to discharge into an ASBS. Furthermore, because NPDES permittees are generally already required to monitor their discharge, it is unclear how – if at all – the additional monitoring required under these provisions would enhance existing procedures. The report required if exceedences are discovered is nothing but a ministerial task, with no accompanying requirement that dischargers change the practices that are resulting in exceedences. Consequently, even under the relaxed standard of AB 2800, these amendments are illegal. They do not prohibit stormwater discharge or even limit it with special conditions. The only condition required – a NPDES permit – is hardly special; it is required of every point-source discharger into waters of the United States. However, as noted above, the AB 2800 standard should not apply to these unique areas. The existing discharge prohibition is the only possible assurance that natural water quality will be protected.

As noted above, the proposed amendments would impose some additional monitoring requirements for stormwater dischargers into an ASBS. We agree that any time discharge is permitted into these areas it should be rigorously monitored. However, these requirements do not go far enough. The provisions should include monitoring of additional parameters in the effluent; at a minimum, dischargers should be required to monitor for conventional, toxic, and bacterial constituents. The proposed amendments should also be more specific regarding the frequency and location of all proposed monitoring. Finally, it is essential that the results of monitoring be reported regularly to SWRCB, and subsequently made publicly available. Because the discharge prohibition should remain in place, however, monitoring requirements should only be necessary for exceptions granted by the SWRCB.

Point Sources Discharges Not Related to Stormwater

According to staff, there are 12 existing non-stormwater point sources discharging into an ASBS.³¹ Of these, only four are operating pursuant to an exception granted by the SWRCB. The remaining unauthorized discharges range in severity from waste seawater to untreated liquid human waste, but in all cases their discharge into an ASBS constitutes a violation of existing Ocean Plan standards and a move away from natural water quality in these areas. The proposed amendments would “clarify” that point sources discharging into an ASBS pursuant to an exception granted by the SWRCB are “limited by special conditions,” and therefore permissible under AB 2800’s standard. The amendments would also delay implementation of the prohibition against these discharges for three years.

With the exception of the specifically allowed delayed implementation, which is a step backward, these amendments do not amount to a substantive change in policy toward dischargers. Point source (and other) discharges have always been permitted if authorized by an exception. The procedural

³⁰ *Id.*

³¹ State Water Resources Control Board, Division of Water Quality, “Informational Document: Public Scoping Meeting for the Proposed Amendment of the Water Quality Control Plan for Ocean Waters of California” (December 2003) at 34-35.

requirements for acquiring an exception under existing Ocean Plan provisions supply a forum for the public to become educated and voice its concerns about these discharges. The substantive standard for granting an exception protects beneficial uses and the public interest.³² The proposed amendments do not change these requirements.

A more pressing issue, which the proposed amendments fail to even attempt to redress, is enforcement against dischargers who have not acquired an exemption. The clarification set forth in the proposed amendments deals only with dischargers that are already compliant. It would be far more useful for the proposed amendments to clarify that the RWQCBs and SWRCB must take enforcement action against any person discharging waste into an ASBS without an exception, including existing dischargers.

The proposed three-year delay in implementation of the prohibition against these discharges is inexplicable given that the discharge prohibition has been in place for more than 20 years. The notion that dischargers simply need more time to come into compliance is simply preposterous.

Like the amendments relating to stormwater, the proposed amendments concerning point sources not related to stormwater would impose new monitoring requirements, including both effluent and receiving water monitoring. These monitoring requirements are more extensive than the stormwater monitoring requirements and include monitoring of all Table B constituents. However, like the stormwater monitoring requirements, they should be changed to be more specific regarding type, location and frequency of monitoring, and should include provisions for reporting and public availability of monitoring results. Because the discharge prohibition should remain in place, however, monitoring requirements should only be necessary for exceptions granted by the SWRCB.

Nonpoint Source Discharges

The SCCWRP report documents a wide range of nonpoint source discharges into ASBS's, including agricultural, forestry, and urban runoff, among other types.³³ Nonpoint source discharges into California waters are one of the most significant threats to water quality in our state, threatening human health by contaminating drinking water and harming aquatic life in many of our waterways. The proposed amendments would permit only nonpoint source discharges that are essential for emergency fire fighting, flood control and slope stability. However, under the amendments, these activities include landscape, road, and parking lot drainage.

In another lamentable move toward legalizing existing illegal discharges into ASBS's, these amendments would permit almost every major category of nonpoint source discharge into an ASBS. No evidence has been presented either that landscape runoff (which presumably encompasses agricultural and timber runoff) or road runoff (which presumably encompasses most urban runoff) is essential for flood control or slope stability. Consequently, despite an ever-increasing body of evidence on the dangers of nonpoint source discharge, the proposed amendments indicate an unwillingness on the part of the SWRCB to do anything about these discharges at all – even in our most pristine water bodies. These amendments are unacceptable even under the relaxed standard of AB 2800, which calls for controlling these discharges to the extent practicable. There has not even been the suggestion that it is impracticable to control these sources of discharge into these special areas. However, as noted above, the AB 2800 standard should not apply to these areas – these discharges should be prohibited outright.

³² Ocean Plan at III.I.

³³ SCCWRP Report at 8-20.

The proposed amendments give a toothless nod to the purpose of the ASBS designation with the following qualification: “[d]ischarges essential for flood control or slope stability . . . must not alter natural water quality.” Only the Ocean Plan’s existing prohibition of nonpoint source discharge into an ASBS can effectively protect natural water quality. By failing to even provide for monitoring of nonpoint source discharges, the SWRCB ensures that it will never know if, and to what degree, alteration of natural water quality is occurring. We encourage the SWRCB to reject these provisions and reaffirm the discharge prohibition as it relates to nonpoint source discharges into areas of special biological significance.

4. *The Proposed Amendments Would Illegally De-designate a Beneficial Use.*

As noted above, the “preservation and enhancement of Areas of Special Biological Significance (ASBS)” is a designated beneficial use under the Ocean Plan.³⁴ The proposed amendments would eliminate this designated use and replace it with “preservation and enhancement of State Water Quality Protection Areas (SWQPAs).” This is more than a simple name change. The definition and required level of protection for the umbrella category “SWQPA,” which could include a range of protected areas and associated discharge requirements, are far less rigorous than for the subset category of ASBS’s. Consequently, by changing the designated use from ASBS to SWQPA, the SWRCB proposes to de-designate a beneficial use.

A state may only remove a designated use after notice and opportunity for a public hearing.³⁵ In addition, a state may only remove designated uses that are not being attained if it demonstrates that attaining the designated use is not feasible because: (1) naturally occurring pollutants prevent attainment; (2) natural, ephemeral, intermittent or low-flow conditions prevent attainment; (3) human uses prevent attainment that cannot be removed without more substantial environmental damage; (4) dams or diversions prevent attainment; (5) natural physical characteristics of the water body prevent attainment; or (6) additional controls would result in severe economic and social hardship.³⁶

Put simply, there are significant procedural and substantive requirements for the de-designation of a designated use. SWRCB has not conducted the mandated de-designation process nor made the required showings. Indeed, it cannot make the required showings; attainment of no discharge into these 34 small areas is perfectly feasible, particularly in light of the availability of bond funds for this very purpose, as discussed in more detail below.

5. *The Proposed Amendments Would Illegally Modify a Water Quality Standard.*

Water quality standards are “provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.”³⁷ In other words, a water quality standard consists of a use and the criteria necessary to protect the use, as well as an antidegradation component. The Ocean Plan sets forth the following designated use: “preservation and enhancement of designated Areas of Special Biological Significance.” Furthermore, the Ocean Plan provides the following criterion for attainment of the use: the maintenance of “natural water quality conditions” and the prohibition of discharge in ASBS’s.

³⁴ Ocean Plan at I.A.

³⁵ 40 C.F.R. § 131.10(e).

³⁶ *Id.* at § 131.10(g).

³⁷ *Id.* at § 131.3(i).

These elements, taken together clearly comprise a water quality standard. The proposed amendments would modify this water quality standard by changing both the use itself (as described above) and the criterion for protecting that use.

The Clean Water Act specifies a procedure for modifying a water quality standard.³⁸ Under this procedure, a state is required to conduct public hearings for the purpose of modifying the standard, make a substantive showing regarding the attainability of the standard, and submit the proposed modification to EPA for approval. The SWRCB may not circumvent these requirements by cloaking this standard modification as an administrative change. The ASBS water quality standard prohibiting discharges into an ASBS must remain in place until SWRCB makes the required showings in a public forum and receives approval from EPA.

6. The Proposed Amendments Would Violate Federal and State Anti-Degradation Requirements.

The federal antidegradation policy provides, in part, that:

Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.³⁹

California's antidegradation policy, articulated pursuant to federal requirements, states:

Whenever the existing quality of water is better than the quality established in [water quality control] policies, such existing high quality will be maintained until it is demonstrated to the State that any changes will be consistent with the maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies.⁴⁰

Accordingly, under both federal and state antidegradation policies, the water quality of high quality waters must be maintained. Under California's policy, changes to existing high quality waters can only be made after a substantive showing – an antidegradation analysis.

By permitting additional discharges into the state's most pristine waters, the proposed amendments threaten to significantly reduce ASBS water quality. Under California's antidegradation policy, if changes to the quality of these waters are permissible at all, they may only be made after a complete antidegradation analysis and affirmative showings in accordance with the above requirements. The SWRCB has not performed any such analysis and therefore cannot adopt these amendments. Areas of special biological significance are not only existing high quality waters – they are the among the highest quality waters in California. Thus, the SWRCB should be especially vigilant in preventing degradation of their water quality.

7. The SWRCB Should Adopt an ASBS Implementation Plan That Includes Dedicated Bond Funding.

³⁸ 33 U.S.C. § 1313(c); 40 C.F.R. § 131.20.

³⁹ 40 C.F.R. § 131.13.

⁴⁰ State Water Resources Control Board, Resolution No. 68-16 (October 28, 1968) (Antidegradation Policy).

We are cognizant of the fact that the existence of so many discharges into ASBS's presents practical concerns for the SWRCB and RWQCBs in light of the discharge prohibition. However, we strongly object to throwing out the baby with the bath water by eviscerating the discharge prohibition to address the discharges. A better solution would be to develop an enforceable implementation plan that identifies the obstacles to attaining the objective of zero discharge into each ASBS, and delineates the steps (with strict timelines) that the State and Regional Boards will take to eliminate the obstacles and implement the discharge prohibition. Such a plan should also provide explicit enforcement guidance to the RWQCBs.

Resources are available for the development and implementation of an such a plan. In the budget trailer bill AB 1747 (Oropeza), signed by the Governor in August 2003, the Legislature found that:

[i]n order to protect the intent of the voters in approving the Water Security, Clean Drinking Water, Coastal and Beach Protection Act of 2002 [Proposition 50], it is necessary and desirable that, to the maximum extent possible, the following principles apply to the implementation of that act: . . . (e) For projects that affect water quality, *preference shall be given to funding projects that will eliminate or significantly reduce pollution into . . . sensitive habitat areas, including areas of special biological significance.*

(Emphasis added.) The Legislature could not have stated its intent to direct bond funds to preventing and cleaning up pollution in ASBS's more clearly. We strongly urge the State Water Board to take advantage of this major window of opportunity and create a program to divert bond monies to a dedicated ASBS fund. This could be similar to the Clean Beaches Initiative, now codified by AB 2534 (Pavley, 2002) as the "Clean Beaches Program" at Public Resources Code Section 30915. This program allocates bond funds for capital projects to divert and treat wastewater discharges into waters adjacent to specified state beaches. Our organization would be more than happy to work with Water Board staff and the Legislature to develop a similar ASBS Program, and/or to support requests for bond funding directed to a specific ASBS.

* * * * *

The proposed Ocean Plan amendments attempt to regulate discharges to the state's 34 areas of special biological significance in the context of the new, relaxed discharge SWQPA standard provided for under AB 2800. However, as noted above, the standard that should control here is not the AB 2800 standard, but the protection of the ASBS beneficial use, which dictates that the state maintain natural water quality to promote the fragile and important biological communities that inhabit each ASBS. The proposed Ocean Plan amendments would be a significant retreat from the strong standard currently provided, and would result in irreversible damage to the quality of waters in these special areas.

SB 512 (Figueroa), which TOC and NRDC are co-sponsoring, would correct the provisions of the Public Resources Code to make the regulation of discharges into SWQPAs consistent with the Water Code and the Ocean Plan. It is distressing that, while we have been working to provide for consistently protective standards for ASBS's and other, future state water quality protection areas, the Board is considering amendments that would undermine these protections and reward those that have flouted the discharge prohibition by legalizing most, if not all, existing discharges.

We strongly urge you to reject these and any amendments that retreat from the strong and necessary protections provided by the current discharge prohibition, and ask that you use the opportunities provided by Proposition 50 and AB 1747 to develop an ASBS Program that will for the first time begin to implement this important prohibition statewide.

Thank you for considering these comments, and please feel free to contact us with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Linda Sheehan", with a long, sweeping underline.

Linda Sheehan
Director, Pacific Regional Office

cc: Art Baggett, Chair, SWRCB
Celeste Cantu, Executive Director, SWRCB